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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1968~~ 66

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI,

On behalf of themselves and all others similarly situated,

Appellants,

against

JOSEPH A. COX and SAMUEL DIFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. MCGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

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No. 1146

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI,

On behalf of themselves and all others similarly situated,

Appellants,

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JOSEPH A. COX and SAMUEL DIFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's Revised Rules, appellees move: To dismiss the appeal taken from the order of the United States District Court for the Southern District of New York, which denied appellants' motion for

summary judgment; or in the alternative, to affirm said order. We so move on the ground that, at this stage of this action, the question sought to be presented is so insubstantial as not to merit or require further argument.

Question Presented

The terms of the New York statute (Surr. Ct. Proc. Act, § 2218 formerly Surr. Ct. Act, § 269-a), attacked as unconstitutional, are valid and have survived several prior attacks in this Court. *Matter of Braier,* 305 N. Y. 148, 691 (1953), app. dism., *sub nom. Kalmane* v. *Green,* 346 U. S. 802 (1953); *Matter of Marek,* 11 N Y 2d 740 (1962), app. dism. *sub nom. Ioannou* v. *New York,* 371 U. S. 30 (1962); rehearing denied, 391 U. S. 604 (1968).

The *only question* presented by this record is whether the District Court correctly rejected appellants' meagre affidavits, which related mainly to matters antedating the decisions in *Matter of Leikind,* 22 N Y 2d 346 (June, 1968) and *Zschernig* v. *Miller,* 389 U. S. 429 (Jan. 1968), as a basis for holding, summarily as requested by appellants, that the terms of the statute were being applied in an unconstitutional manner.

Statement

(1)

When this case was last before this Court (389 U. S. 581), on petition for certiorari, a "judgment" which merely refused to order the convening of a three-judge court was vacated and the case was remanded to the Court of Appeals for the Second Circuit "for further consideration in light of *Zschernig* v. *Miller,* 389 U. S. 429", decided the same day. The Court of Appeals, without further argument and upon reconsideration, reversed the order of the District Court denying the application to convene a

three-judge court and remanded the case for consideration of the constitutional issues presented by the complaint. 391 F. 2d 586 (March 8, 1968). The Court of Appeals, upon such reconsideration, observed that this Court in *Zschernig,* had interpreted *Clark* v. *Allen,* 331 U. S. 503, as being "concerned with the words of a [state] statute on its face, not the manner of its application"; and noted the fact that in *Zschernig,* this Court had held that "the history and operation" of a similar Oregon statute constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress". 391 F. 2d, at p. 587.

(2)

The *appellants* then moved, before a *single* District Court Judge, for summary judgment. By reason of the Court of Appeals order, entered upon "reconsideration upon remand by the Supreme Court of the United States", remanding the issues to a *three-judge* court for reconsideration, the appellees opposed assumption of jurisdiction over the issues by a single District Court judge (Attorney General's affidavit, sworn to April 24, 1968).

On June 13, 1968, District Judge McLean notified the parties that "plaintiff's motion for summary judgment will be heard before the Court of three judges duly designated herein on June 25, 1968." Counsel were required by the District Court order to file all papers pertinent to the disposition of the motion by June 20, 1968.

On behalf of the appellees, the Attorney General filed with the three-judge court a supplemental affidavit, sworn to June 20, 1968, to show that there were issues of fact in dispute with reference to the "application" of the terms of the statute here involved which prevented the granting of the relief sought by the plaintiffs. The Attorney General called the Court's attention, in addition, to the fact that the Surrogates named as defendants exercised juris-

diction in only four of the State's 62 counties; and that their decisions, like those of all the other Surrogates in the State, were reviewable by the Court of Appeals of the State, whose then very recent decision in *Matter of Leikind*, 22 N Y 2d 346 (June 14, 1968), was called to the attention of the three-judge Court, as evidence of the fact that the highest Court of the State was cognizant of this Court's decision in *Zschernig* and had decided the *Leikind* case in the light of the *Zschernig* decision. The Attorney General suggested that the purpose of the summary judgment motion was to avoid a hearing at which evidence could be produced to show that New York's statute, constitutional on its face, was being applied in a constitutional manner. As an indication of New York's method of application of the statute, the Attorney General also called the three-judge Court's attention to the fact that the New York Court of Appeals, on the very same day it decided *Matter of Leikind* (*supra*), had denied the Attorney General's motion for leave to appeal from an order of the Appellate Division, Third Department, directing the transmission of an alien beneficiary's share to Poland (*Matter of Krasowski*, 22 N Y 2d 827), and referring to its *Leikind* decision, in denying such leave. See also 28 A D 2d 180 (3d Dept., 1967), the decision appealed from in *Krasowski*. And see *Matter of Kina*, 23 N Y 2d 720 (Nov. 1968), aff'g 29 A D 2d 563 (2d Dept., 1967).

In *Matter of Leikind*, Judge BREITEL, writing for the New York Court of Appeals, held that the petitioner in that case had "made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations" (22 N Y 2d at p. 352). New York, clearly, is cognizant, therefore, of the problem of applying its statute in a manner which would be federally constitutional under the tests set forth in this Court's prevailing opinion in *Zschernig*.

(3)

In support of their summary judgment motion, appellants referred only to isolated cases in which the New York Courts had applied the statute in question. In response, the Attorney General set forth not an exhaustive list, but examples of cases where the New York Courts had directed transmission of payments to foreign residents to whom transmissions were found to be feasible, even in situations where the persons resided in countries which had not been removed from the list of countries to which, pursuant to Treasury Regulation, federal funds might not be transmitted (Attorney General's affidavit of June 20, 1968, paragraph 13).*

The Attorney General's affidavit also noted the fact that the federal government had long recognized the power of the States to regulate the succession and distribution of the estates of persons located within the individual States. *United States* v. *Fox*, 94 U. S. 315 (1877); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942). The Attorney General also set forth his information that the State Department declined to make a judgment, as to whether in certain Soviet States, Soviet heirs do receive benefit or use or actual enjoyment of estate shares (A. G. affid. of June 20, 1968, par. 14).

(4)

No testimony was offered by appellants upon the hearing of their motion for summary judgment. They rested upon an oral argument that this Court's decision in *Zschernig* compelled the invalidation of the New York statute, since application of the statute necessarily required an "invasion of foreign policy" (Minutes, p. 9).

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* The constitutionality of the 1968 amendment to Surr. Ct. Proc. Act, § 2218, enacted by L. 1968, ch. 998, which restricts transmission of estate funds to countries to which federal funds may not be transmitted by reason of federal order or regualtion, is not involved on this appeal (Minutes, p. 53).

ARGUMENT

In the light of *Gorun* v. *Fall*, 37 U. S. Law Week 3261 (decided Jan. 20, 1969), where this Court affirmed the denial of summary judgment in a similar case arising from a United States District Court in Montana, the order appealed from should also be affirmed or this appeal should be dismissed since it presents no substantial federal question.

(1)

In *Gorun* v. *Fall*, —— U. S. ——, 21 L. Ed. 2d 628, 37 U. S. Law Week 3261 (decided January 20, 1969), this Court rejected all the arguments which appellants seek to have the Court consider here. Because the decision, although it involved a reciprocity statute, is so apposite, we reproduce it in full:

> "496. *Gorun* v. *Fall*. Per Curiam. The motion to affirm is granted and the judgment is affirmed.
>
> "Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice Fortas concur.
>
> "Appellants are nonresident aliens living in Romania who were named as beneficiaries of an estate being probated in Montana. It has been assumed for the purpose of this appeal that they will receive from that estate unless prevented by the Montana reciprocal inheritance statute (Mont. Rev. Codes § 91-520) which would condition their distribution upon a showing that Romania similarly allows citizens of this country to receive, and to enjoy here, property bequeathed in Romania. While the estate was being administered in the state courts of Montana, appellants filed this complaint to have the three-judge court declare the statute unconstitutional and to enjoin its application. After issue was joined, they moved for summary judgment on the authority of *Zschernig* v.

Miller, 389 U. S. 429, in which we struck down the Oregon reciprocal inheritance statute as an impermissible interference with federal power over foreign affairs.

"Federal policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See 25 Fed. Reg. 3458.

"At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR § 211.2. As our opinion in *Zschernig* makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that federal policy.

"The three-judge court dismissed the complaint, saying: '[T]he Montana court now advised by *Zschernig* of the boundary of the constitutional power of the state . . . should feel free to fashion a procedure for applying § 91-520 in a manner not offensive to the Federal Constitution.'

"While the four of us have no objection to summary disposition of this appeal, dismissal seems singularly inappropriate in light of our recent decisions saying over and again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal. See *Zwickler* v. *Koota*, 389 U. S. 241, 250-252. In spite of our aversion to abstention, see id., *Dombrowski* v. *Pfster*, 380 U. S. 479, 486-487, it would be better judicial administration to hold the federal case, pending resolution of the state proceeding, than to dismiss it in the face of clear-cut federal policy in favor of the claim of appellants. Cf. *Kaiser Steel Corp.* v. *Ranch Co.*, 390 U. S. 593."

The three-judge court in *Gorun* had, as here, denied the appellants' motion for summary judgment, 287 F. Supp. 725. And, as we noted in our brief in an earlier case, the

door to the Surrogate's Court in New York is open to the presentation of any claims for the payment of any estate shares to which appellants may be entitled. *Ioannou* v. *New York*, 391 U. S. 604 (1968).

In one of the cases which appellants cite (p. 2) as a basis for invoking this Court's jurisdiction, the way had been pointed for a similar result here: state court disposition of the issues presented. *St. John* v. *Wisconsin Board*, 340 U. S. 411, 414 (1951), citing *Douglas* v. *Jeannette*, 319 U. S. 157, 165 (1943). There is no ground to suppose that, particularly in the light of the decision in *Matter of Leikind*, 22 N. Y. 2d 346 (1968), that the intervention of a federal court will be either necessary or appropriate to secure appellants' constitutional rights.

(2)

Upon the present record, it is unnecessary to stress the obvious fact that every inquiry by a state court into the subject of the interpretation of a foreign country's law does not necessarily involve the state court in an adventure into the field of foreign affairs. *Matter of Leikind* (*supra*, at pp. 351, 352). Nor need we emphasize now the need for the federal courts "not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs". *United States* v. *First National City Bank*, 396 F. 2d 897, 901 (2d Circ., 1968); citing, as an example, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 111 (1948).

The appellants have failed to observe what was also so succinctly stated in the *First National Bank* case (*supra*, at p. 901):

> "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case."

CONCLUSION

The order of the three-judge Court, appealed from, should be affirmed, or this appeal should be dismissed.

Dated: New York, New York, March 17, 1969.

Respectfully submitted,

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